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Supreme Court of the United States.

OCTOBER TERM, 1906.
No. 213.

MARY AMIS QUINLIN, EXECUTRIX OF LEONARD G. QUINLIN, DECEASED, - - *Plaintiff in Error,*

vs.

GREEN COUNTY, KENTUCKY, - *Defendant in Error*

BRIEF FOR PLAINTIFF IN ERROR.

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This case is here on CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit, propounding the following questions, *to-wit:*

1st. Do the facts found by the Circuit Court conclude or estop the county from denying liability to the plaintiff upon the bonds and coupons in suit, by reason of non-compliance with the terms and conditions imposed by the favorable vote of the county authorizing a subscription to the stock of the Cumberland & Ohio Railroad Company and the issuance of bonds in payment therefor? Or, if this question should be deemed too broad, then,

2nd. Assuming the facts to be as found, was a *bona fide* purchaser before maturity of these bonds and coupons for value, entitled to assume in his purchase that Green County had before their issuance been "fully and completely exonerated from the payment of the capital stock subscribed for by the County Court of said County for and in behalf of said county to the Elizabethtown & Tennessee Railroad Company?"

On February 24, 1869, in furtherance of a project to build a railroad traversing the State of Kentucky, the Kentucky legislature passed an act to incorporate the Cumberland & Ohio Railroad Company, by which act each of the various counties in which the road was expected to run was authorized to subscribe stock in the company, and to issue bonds in payment of such subscription, after submitting the question of the subscription to the vote of the qualified voters of such county. (Acts 1869-70, Vol. 2, pp. 225-231.) The section of this act which is involved in this litigation is as follows:

"Sec. 15. That any city, town, or county through which said proposed road shall pass, is hereby authorized to subscribe stock in said railroad company in any amount any such city, town, or county may desire; and the county court of any such county is authorized to issue the bonds of their respective counties in such amount as the county court may direct; and the chairman and board of trustees, or mayor and aldermen of any town, and the mayor and aldermen or council of any city, are hereby authorized to issue bonds of their respective towns or cities in like manner. *All said bonds shall be payable to* BEARER, with coupons attached, bearing any rate of interest not exceeding six per cent. per annum, *payable semi-annually in the city of New York*, payable at such times as they may designate, not exceeding thirty years from date; but before any such subscription on the part of any town, city or county shall be valid or binding on the same, the mayor and aldermen or chairman and board of trustees of any town, the mayor and aldermen

or council of any city, and the county court of any county, having jurisdiction, shall submit the question of any such subscription to the qualified voters of such city, town or county, in which the proposed subscription is made, at such time or times as said chairman and board of trustees, or mayor and aldermen of any town, mayor and aldermen or council of any city, or the county court of any county, as aforesaid, may, by order, direct; and should a majority of the qualified voters voting at any such election vote in favor of subscribing said stock in said railroad company, it shall be the duty of such county court, trustees, or other authorities aforesaid, to make the subscription in the name of their respective cities, towns or counties, as the case may be, and proceed to have issued the bonds to the amount of such subscription as hereinbefore directed; and the mayor and aldermen, or chairman and board of trustees of any town, mayor and council or aldermen of any city, or the county court having jurisdiction in any such county that may subscribe for stock in said railroad company, are hereby authorized and required to levy annually and collect a tax upon the taxable property in their respective cities, towns or counties, as listed and taxed under the revenue laws of this State, a sum sufficient to pay the interest on said bonds as it accrues, together with the cost of collecting same. They are also authorized and required to make provision for paying said bonds at their maturity; and to enable them to do this, they may establish a sinking fund, and loan out the same at any rate of interest they can obtain, and, if necessary, collect the same by law, or may adopt such

other means as to them may seem proper and expedient; and may levy and collect taxes annually or otherwise on the property aforesaid for this purpose. The person collecting said tax shall give tax receipts for the same; and any taxpayer paying tax to said road under the provisions of this act, shall be entitled to stock in said railroad company to the amount of taxes he may pay; and the cities, towns or counties, under whose subscription the tax is levied, shall be divested of stock to the extent of stock issued on said tax receipts; and whenever such receipts to the amount of one share or more shall be presented to the company, or an officer or agent designated by it, certificate stock shall be issued for a fractional part of a share: Provided, That the said cities, towns or counties shall receive no dividends on their stock, but the holders of stock issued on said receipts as aforesaid shall be entitled to the same dividends, and to all the rights and privileges as the original and cash stockholders: And Provided, further, That said company may, in any way that may seem expedient to it, provide for and pay, each or any year, to the cities, towns or counties, or any of them, the amount of tax levied by reason of said bonds, and thus stop the collection of tax for that year: And Provided, further, That the company may purchase said bonds and surrender them at any time to the cities, towns or counties issuing them, and have the same canceled; and the mayor and council or aldermen of any city, or the mayor and aldermen or chairman and board of trustees of any town, or the county court of any county having jurisdiction, may

appoint collectors for said tax, or may require the sheriffs or marshals of the respective cities, towns, or counties, within the jurisdiction of the same, to collect the said tax, all of whom shall have the same powers and remedies, and shall proceed in the same way for the collection of said tax, as the sheriffs in the collection of the State revenue. The mayor and aldermen, or chairman and board of trustees, shall require and take from the person collecting the tax a bond, with sufficient sureties, conditioned as they may think best. If the collections are made by the sheriff or marshal, they shall settle and pay over the tax at the same time that sheriffs are required to pay the State revenue; and for their services in collecting they shall in no case be allowed more than three per cent. commission on the amount collected. *That, if preferred, the application herein authorized to be made to the county court, may be made to the presiding judge of the county court; and all the powers herein given to the county court are hereby vested in the presiding judge of the county court.* At all meetings of the stockholders for the purpose of electing officers, or any other purpose, the said towns, cities and counties may, by proxies duly authorized by the authorities thereof, cast a vote for each share of stock so subscribed by said town, city, or county: Provided, That whenever certificates of stock shall be issued to persons residing therein for taxes paid, the stock represented by such certificates shall be deducted from the stock represented and voted for by said proxies; and said taxpayers shall be entitled to one vote for each certificate so issued to them repre. senting one share of stock." (Italics ours.)

Under this power application was made to the presiding judge of the Green County Court by the Railroad Commissioners, as provided for in the section, for a submission to the popular vote of the question of subscribing two hundred and fifty thousand dollars to the capital stock of the railroad company. Now, it appears that in the year previous the question of a subscription to the capital stock of another projected railroad, the Elizabethtown & Tennessse Railroad Company, had been submitted to the vote of the people of Green County, and they had voted in the affirmative, and an order had been entered in the Green County Court directing the clerk of the court, for and on behalf of the County of Green, to make said subscription. It is evident that the project of the Elizabethtown & Tennessee Railroad Company had fallen through and been abandoned, for the clerk never made or attempted to make any subscription, and almost immediately thereafter there arose a litigation between the Mercer County Court and the Kentucky River Navigation Company, as to whether such an order as that made as to the subscription of stock in the Elizabethtown & Tennessee Railroad Company was void. Furthermore, the application for subscription to the Cumberland & Ohio contained a provision that the county should be exonerated from the payment of capital stock in the Elizabethtown & Tennessee Railroad Company. The submission to the vote of the people contained a like provision and the order of subscription referred to this condition.

The order submitting the Cumberland & Ohio subscription to the vote of the people shows that the authorities of Green County did not recognize the action previously taken as a subscription for stock of the Elizabethtown &

Tennessee Railroad, for it provides that the bonds for the Cumberland & Ohio subscription shall not be issued until said County of Green is fully and completely exonerated from the payment of the capital stock voted by said county, *and authorized to be subscribed* by said Green County Court, to the Elizabethtown & Tennessee Railroad. The vote upon the Cumberland & Ohio subscription was favorable, and the presiding judge of the County Court entered an order of subscription not directing the subscription to be made, but *subscribing* for the stock of the Cumberland & Ohio. Afterwards the litigation between the Mercer County Court and the Kentucky River Navigation Company reached its conclusion in the Court of Appeals of Kentucky, and an order exactly similar to the one made in the Green County Court relative to a subscription for the stock of the Elizabethtown & Tennessee Railroad was held to be absolutely void. (*Mercer County Court vs. Ky. River Navigation Co., 8 Bush, 300.*) Afterwards the bonds of the County of Green were printed, issued and delivered to the agents of the Cumberland & Ohio Railroad.

From the findings of facts it appears that plaintiff's intestate was the *bona fide* holder for value of the bonds and coupons sued on (*finding 1, p. 1*) when he purchased them; but knew that the railroad in question had not been constructed, except to the extent found by the circuit judge (*finding 15, p. 5*).

It appears that the bonds sued on, $47,509.00, were part of an issue of $250,000.00 (*findings 8 and 9, p. 3*); that these bonds were issued in payment of a subscription by Green County to the capital stock of the railroad company, and that the certificates for the entire stock have ever since the issu-

ance of the bonds been held and owned by the county (*finding 8, p. 3*); that the bonds were delivered in 1872, before the road was built (*p. 4*).

It appears that the railroad company had power to receive the subscription to its stock from Green County, and that the request for the subscription was made June 17, 1869, and that on said day the county judge, acting alone and as the County Court, entered the order submitting the question of subscription to the qualified voters of the county; that an election was held July 3, 1869, resulting in a favorable vote, and the subscription made accordingly, June 3, 1870 (*findings 2 to 5 inclusive, pp. 1 and 2*); that October 12, 1871, the county judge, alone and as the court, ordered printed the entire issue of bonds necessary to pay the county subscription aforesaid, and that the bonds were issued accordingly and delivered to the railroad company.

It appears that a condition of the subscription was that the company should locate and construct its railroad through Green County and within one mile of Greensburg in said county and expend the amount subscribed as aforesaid within the limits of the county; also upon further condition that the bonds should not be issued or the county pay any part of principal or interest thereof until the county should be fully and completely exonerated from payment of the capital stock voted by said county and "*authorized to be subscribed*" to the Elizabethtown & Tennessee Railroad, and that only $150,000 of the bonds issued or proceeds thereof were expended within the limits of the county, said amount being expended in grading, building and tunnelling on five miles of railroad, when the work was suspended for years, and afterward completed to Greensburg by the Louisville &

Nashville Railroad Co., at its own expense, under terms of its lease from the railroad company aforesaid, and not with any of the bonds issued as aforesaid, and that said road was never constructed through Green County except from the northern limit to Greensburg, about one-third of the distance from its northern to its southern limit.

It appears that no formal exoneration of the county from the subscription authorized to the Elizabethtown & Tennessee Railroad was ever made or attempted, but that nothing has ever been done in respect of it and neither bonds nor stock ever been issued under it.

Upon the facts thus established, the Circuit Court, in deference to the decision of the Court of Appeals of Kentucky in J. D. Shortell vs. Green County (116 Ky. 108), held in favor of defendant.

ARGUMENT

I.

Exonerations from E. & T. R. R. Co. " ."

We shall consider the interrogatories in inverse order. The Circuit Court does not find (page 5) that the county was not exonerated from the supposed subscription to the stock of the Elizabethtown & Tennessee Railroad Company; *e contra* it finds (No. 17, page 5) that, although there was no express exoneration, nevertheless nothing had ever been done in respect to the subscription and neither bonds nor stock issued under it nor under the orders of court respecting it.

The defense based upon this point is absolutely without merit. The Circuit Court finds, as aforesaid, that the subscription project was abandoned both by the county and

the railroad company, and nothing done under it in the thirty-eight years that had elapsed since the vote on it was taken. What greater practical exoneration could exist is next to inconceivable.

The legal exoneration, however, is as complete as the practical, for it not only appears upon the order itself (p. 2) that it is void, but it is demonstrable from the record that the County Court treated it as void, and upon the strength of its invalidity made the order of subscription of June 3, 1870, to the stock of the Cumberland & Ohio Railroad Company (pp. 2, 3).

The ground of invalidity of the attempted subscription to the stock of the Elizabethtown & Tennessee Railroad Company is elaborately expounded in *Mercer, etc., v. Navigation Co., 8 Bush, 300*, wherein the court held that any subscription, to be valid, must be contained in the order of the court, the court being able to *speak only through its records;* that accordingly the court's order appointing a commissioner to make the subscription upon compliance with the conditions thereof was void, and the subscription made accordingly was void. The court said concerning the order and the judgment in mandamus compelling levy of a tax,

> "This judgment cannot be sustained unless the action of the County Court, together with that of the commissioner, amounts in estimation of law to a complete and binding contract of subscription." (*P. 305.*)

It further said:

> "While acting together as a County Court, they (the justices) were authorized for and on behalf of

their respective counties to subscribe to the capital stock of the Navigation Company. County Courts, under the law, act and can act only through their orders made of record. By such orders so made the courts and those for whom they are legally authorized to act are bound." (*P. 306.*)

After citation of authorities the court proceeds:

"The agent, Thompson, was appointed without authority of law, and his acts cannot bind the tax-payers of Mercer County. Unless the orders of the County Court, made of record when a majority of the justices were present, amount of and within themselves, disconnected from any act done out of the court by anyone, or in court and not of record, to a perfect and complete subscription of stock, the award of the mandamus was erroneous," etc., etc. (*P. 307.*)

Obviously under this decision the order directing *the clerk to subscribe* to the stock of the Elizabethtown & Tennessee Railroad Company was void, and it is demonstrable from the record that it was so regarded by the County Court when the subscription was made to the stock of the Cumberland & Ohio Railroad Company, and so treated when the bonds were delivered.

In the order directing the clerk to subscribe, the court, after reciting the vote in favor of the subscription, declared:

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the County of Green, make this subscription on the terms specified in the order so submitting the question to a vote as aforesaid."

The order contained no subscription. It did not declare that the county thereby *subscribed* for three thousand shares of the stock of the company, nor did it recite the conditions upon which the vote was taken. *It delegated to the clerk the duty of making the subscription and of seeing that it was done upon the conditions upon which the county had voted to make the subscription.* The order was, therefore, as clearly void as that in the case of *Mercer, etc., vs. Navigation Co., 8 Bush, 300 supra.*

Not only was the order void, but it was recognized by the County Court of Green County to be void, for when that court, June 3, 1870, one year and fourteen days afterward, subscribed to the stock of the Cumberland & Ohio Railroad Company it recited the election and its results and declared:

> "Now, therefore, I, Thomas R. Barnett, the presiding judge of the Green County Court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for two hundred and fifty thousand dollars of the capital stock of said Cumberland & Ohio Railroad Company for and on behalf of the said County of Green, which subscription is to be paid in the bonds of said county as prescribed in the said order of subscription, and this subscription is made with the conditions set out in the order of this court ordering said election and now of record in the office of this court."

While, therefore, we find the court, on May 20, 1868, delegating to the clerk the delicate duty of subscribing to the stock of a railroad company upon the terms of the county vote *as he might be advised in regard thereto*, we find the

same court, June 3, 1870, making the subscription in the order itself.

True, the Court of Appeals had not made its decision in the Mercer County case June 3, 1870, but it is demonstrable from the action of the Green County Court, May 20, 1868, and June 3, 1870, that between those two dates the County Court had gotten light, doubtless from information of the litigation in the court below, or, possibly, argument in the Appellate Court, of the probable invalidity of the order of May 20, 1868. Accordingly, there is no provision, as the Kentucky court in *Shortell vs. Green Co., 116 Ky. 108 (April, 1903)*, seems to suppose, that any formal "release" is to be made, but the order for the vote simply provides the condition that the bonds shall not be issued, etc., "until "said County of Green is fully and completely exonerated "from the payment of the capital stock voted by said "county and ***authorized*** to be subscribed by said Green "County to the Elizabethtown & Tennessee Railroad, or "any part of the interest thereon." (Rec. p. 2.) It will be observed that nowhere is there any reference to any subscription to the stock of the Elizabethtown & Tennessee Railroad Company, but that this order is carefully drawn in such a manner as not even to imply that a subscription had been made, but only that a subscription had been "***authorized.***"

The order says nothing of any formal release, nor does it compel anybody to do any act, but simply forbids the bonds to be issued or the principal or interest thereof paid before the county's exoneration. Had the County Court intended to require any formal release from the subscription by the Elizabethtown & Tennessee Railroad Company nothing would have been easier than to so provide. But, as

aforesaid, the subscription had already been discredited, as is apparent from the contrast between the two orders aforesaid of May 20, 1868, and June 3, 1870, and it was, therefore, only necessary to require exoneration, howsoever obtained, before delivery of the bonds.

Accordingly, no bonds were delivered until after the Court of Appeals had finally settled the question evidently already mooted, *to-wit*, by the decision aforesaid made at the April term, 1871. It was only after that decision that the bonds were issued. Although the subscription was made June 3, 1870, the bonds were not even printed until October, 1871 (*p. 3*). They were printed upon request made October 12, 1871 (*p. 3*).

If, therefore, anything be demonstrable, it is demonstrable not only that the county was completely exonerated upon the issuance of the bonds, but that it was so understood by the County Court which withheld the issuance thereof until such exoneration.

Not only is this true, but the County Court was the judge of the exoneration and held the county to be exonerated. *Provident, etc., Co. vs. Mercer Co., 170 U. S. 593, 42 L. Ed. 1156.*

The order of subscription to the stock of the Cumberland & Ohio Railroad Company was made through the presiding judge of the County Court, but he acted as the County Court (*finding No. 4, p. 2, No. 6, p. 2.*) He was authorized so to act, for the statute under which the aid was voted so provided. The charter, *to-wit, Act of February 24, 1869*, incorporating the company, quoted *supra*, provided, *Sec. 15:*

> "That, if preferred, the application herein authorized to be made to the County Court, may be made to the

presiding judge of the County Court; and all the powers herein given to the County Court are hereby vested in the presiding judge of the County Court."

The result is that, although May 20, 1868, the Green County Court made a void order directing its *clerk* to make a subscription to the stock of the Elizabethtown & Tennessee Railroad Company, it avoided all the points of invalidity thereof in the orders of June 17, 1869, and June 3, 1870, and thoroughly understood wherein the invalidity of the first order lay, and what exoneration was necessary for the county's safety. Accordingly, the County Court determined that it was exonerated, and delivered the bonds which were not directed to be printed until October 12, 1871, as above indicated.

Consequently, we submit that there is neither legal ground for, nor any just merit in the defense based upon this point.

If instead of the condition aforesaid being simply for the county's exoneration it had been for procurement of some act of release, as inadvertently surmised in Shortell v. Green Co., 116 Ky. 108, nevertheless the decision in Mercer Co. v. Navigation Co., 8 Bush, 300, would have dispensed with the procurement of such release.

In *Rountree v. Hendricks, etc., 1 B. Mon.*, the covenant was to pay on condition that plaintiff procured his wife's relinquishment of dower, and he neither obtained her deed nor put her to death, but her dower was terminated by the act of God, and the court held the condition discharged and the covenant absolute.

Likewise in *Peart v. Taylor, 2 Bibb, 556*, where the contract required Taylor at his own proper charge and cost to survey and plat the lands in question and—

"to clear lands, build houses, plant orchards, and to do everything necessary to save and secure the said land according to the king's proclamation and the colonization act,"

it was held that Taylor was excused from performance by the repeal of the requirements of the king's proclamation and colonization act.

II.

Conditions of C. & O. R. R. Co.

The learned circuit judge, in his conclusions of law, *page 6*, expressly declares his finding to be "in deference to said opinion," *viz.*, opinion in *Shortell v. Green Co.*

Whatever might be the deference due from the Circuit Court to the State Court of last resort in a case of this kind, this court must form its independent opinion. If the question were evenly balanced, this court might "lean" toward the conclusion reached by the State Court, but nevertheless would form its independent opinion and make its independent judgment, regardless of a contrary decision reached by the State Court.

Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359;
Folsom v. Township, 159 U. S. 611, 40 L. Ed. 278;
Stanly Co. v. Coler, 190 U. S. 437, 47 L. Ed. 1126;
Great Southern, etc., Hotel Co. v. Jones, 193 U. S. 532, 48 L. Ed. 778.

Of course, if the decision of the State Court of last resort preceded the issuance of the bonds so that they appeared invalid when issued, such decision would become

part of the law of property and be controlling upon the Federal Court, but in this case the Shortell decision, upon which the circuit judge predicated his judgment, *was made after the institution of this action.* The question is, accordingly, *res nova* with this court.

The contention of Green County is that the purchasers of the bonds actually issued by the county would obtain no right whatever under the bonds until the conditions of the subscription were complied with, *to wit*, the road constructed through the county within a mile of Greensburg, and the entire proceeds of the subscription spent in the county. This contention involves:

(a) That although the bonds were voted in aid of the construction of the road, nevertheless they could not be used in aid of its construction, but that the road must be constructed without the proceeds of the bonds, unless, forsooth, the purchasers chose to pay the price of the bonds and then await the result of the railroad company's operations in order to ascertain whether or not they should ever become entitled to the bonds;

(b) That although the means of building the road are the proceeds of stock subscriptions, the county might nevertheless take, vote, hold, and, if it chose, sell the stock subscribed for with only the contingent liability of paying the price, although it had issued its bonds to be sold in the open market for the highest price obtainable, in order that the proceeds of the bonds might be used in constructing the road;

(c) That the county should obtain the stock subscribed for, and should have a right to have the proceeds of its bonds issued in payment therefor expended in the county,

but that the bonds were either not to be delivered, or, if delivered, were not to become valid until it should afterward be determined whether or not the company were financially able to complete the road from the northern to the southern boundary of Green County, and expend the particular money received as proceeds of the bonds in that county;

(d) That although the county received the stock and made such disposition of it as it chose, *and although it delivered the bonds in payment therefor*, although it required that the bonds be sold and the proceeds expended in the county, nevertheless, if only $249,000, instead of $250,000, were so expended, and if the road were completed only nine-tenths or ninety-nine-hundredths of the distance from northern to southern boundary of the county, the purchasers of the county bonds should lose their entire investment and the county obtain the benefit of their money without obligation to pay anything therefor.

That the county did not so understand its subscription, but understood the contract of subscription to impose the conditions solely upon the railroad company, and not upon the bondholders, is proved by the verbiage of the order of subscription, and that the bondholders did not so understand it is proved by their purchasing and paying for the bonds; the order (*p. 2.*) declares the subscription "upon "condition that said company shall locate and construct "said railroad through the said County of Green within one "mile of the town of Greensburg in said county, and shall "expend the amount so subscribed within the limits of "Green County, and also upon the further condition that "said bonds shall not be issued or said county pay any part "of the principal or interest on said amount subscribed to

"said Cumberland & Ohio Railroad until said County of "Green is fully and completely exonerated from the pay-"ment," etc., of the Elizabethtown & Tennessee subscription.

The frame of this order demonstrates that the County Court understood how to make a *condition precedent* when it intended so to do. It forbade the bonds "to be issued" or the county to "pay any part of the principal or interest" until exonerated from the previous subscription, but made no such provisions as *conditions precedent* in respect of the construction of the road through the county or the expenditure of the proceeds of bonds within its limits, and any such provision would have been palpably absurd and suicidal.

The care with which this order was evidently framed indicates that the County Court fully understood the situation; and the verbiage of the order indicates the obvious intention to impose the conditions upon the company, and not upon the bondholders, except with reference to the exoneration from the subscription previously authorized to the Elizabethtown & Tennessee Railroad Company.

The order (*p. 2*) is carefully guarded in mentioning the stock as "voted" by the county and as "authorized to be subscribed" by the county, instead of speaking of the transaction as a subscription. It is also carefully guarded to forbid the "bonds" "issued" until the county's exoneration from the payment on account of the previous vote, etc. But when the order refers to the conditions concerning the location and construction of the road and expenditure of the money, it carefully provides that the conditions shall be that the "company shall locate and construct"

the road through the county within one mile of Greensburg and expend the amount so subscribed within the limits of Green County, thus imposing the condition upon the railroad company *and not making the performance of the conditions precedent to the issuance of the bonds*, as was done with reference to the county's exoneration from the previous vote for subscription. Indeed, so carefully is the order framed that the provision for the railroad company's constructing the road as designated, and expending the money as prescribed, precedes the condition concerning the exoneration of the county above mentioned, when, if it had followed instead of preceding such condition, the order would have required the road built as designated and the proceeds of the bonds expended as prescribed before "said bonds shall" "be issued."

It is consequently obvious that the order was carefully framed to avoid the inference that the construction of the road and expenditure of the money were conditions precedent to the issuance of the bonds.

Seeing, then, that the conditions in question were attached to the action of the company and not to the issuance of the bonds, it results that the bondholders have no concern with the conditions, nor the performance of the conditions, to locate or construct the road as designated or to expend the money as prescribed. If the railroad company failed to locate and construct the road, or to expend the proceeds of the bonds as agreed, the county would have its right of action for damages against the railroad company, or, peradventure, might procure its mandatory injunction for specific performance of its agreement. Such remedies would be appropriate to the county's relief, but to hold that

the construction of the road and expenditure of the proceeds of the bonds must precede the issuance or sale of the bonds is equally as preposterous as to hold that the road must be constructed through the county with the proceeds of the bonds before the bonds are issued or before the bonds shall become of any value.

The Kentucky Court in *Shortell vs. Green County*, *supra*, accordingly misapprehends the vital question involved. The question was not whether or not the bondholders were affected with notice of the non-performance of conditions invalidating their bonds, but whether or not the conditions attached to the railroad company or to the bondholders.

The question of recitals in the bonds *vel non*, and of estoppel by recitals, is not involved. Consequently, the real case is not concluded by the argument advanced by the Kentucky Court. That court seems to have understood the case to turn upon the question of notice to the bondholders of non-performance of the conditions of locating and constructing the road and expending the proceeds of the bonds, and accordingly the Kentucky court said (p. 125):

> "In determining this question, an important distinction is made by the authorities between those bonds which contain recitals certifying that the preliminary requisites for the issue of municipal bonds have all been complied with, and bonds containing no such recitals."

The "*preliminary* requisites for the issue of" the bonds were not the location and construction of the road, and expenditure of the proceeds of the bonds, but the exoneration of the county from the previous vote of aid to another railroad company. The expenditure of the proceeds of the

bonds could not possibly be one of the "preliminary requisites for the issue of" the bonds, for the bonds must issue before they could be sold to yield proceeds; nor could the location and construction of the road be one of such "preliminary requisites for the issue of" the bonds, the proceeds of which are to be invested in such construction. The doctrine of the Kentucky Court is, therefore, thus susceptible of a *reductio ad absurdum*.

The county officers issuing the bonds understood the situation better than the Kentucky Court, for they realized that the proceeds could not be expended, nor invested in the construction of the railroad before the bonds were sold, and that for the same reason the bonds could not recite such investment of the proceeds or construction of the railroad. A recital in the bonds of such investment of the proceeds would mean nothing to the purchasers of the bonds except a misrepresentation. To represent to the purchaser by a recital in the bonds that the price which he was about to pay had already been invested in the construction of the road in the county would be *felo de se*. We must, therefore, conclude that the doctrine of the Kentucky Court, while eminently pertinent to some cases, is totally inapplicable to this. It may be helpful to advise intending purchasers that conditions precedent have been performed, but it can effect no good to misrepresent as done what could not possibly have been done.

The Kentucky Court lays stress upon these concluding words of the order of June 17, 1869, *viz.*: "Conditioned and to be paid, as above stated," and these words of the order of October 12, 1871, "The same to be conditioned as specified in the order submitting the vote of the said county." The language quoted is entitled to no such effect as

is attributed thereto, for the language in the order of June 17, 1869, simply refers to what had been previously specified particularly in the order, and constituted no provision that the subscription should only be paid upon performance of the conditions, and the language quoted from the order of October 12, 1871 makes no provision for reciting the conditions in the bond, but had provision for such recitals been made they could not have varied the effect of the order of June 17, 1869, upon which the taxpayers voted. Indeed to have expressed in the bonds the conditions "specified in the order submitting the vote," would not have made the expenditure of the proceeds, nor the construction of the railroad through the county, conditions precedent to the issuance of the bonds, but the recitals in the bonds would have meant nothing more than the provisions in the order, *viz.:* That the railroad company should invest the proceeds of the bonds in the county and should construct the road through the county. The recital would not have imposed upon the bondholder buying the bond and paying his money the obligation to guarantee the proper investment of the proceeds by the railroad company. There is no provision in the order, or elsewhere, for such obligation upon the bondholder, and no intent expressed in the order submitting the vote that the bondholder should ever incur such unnatural obligation. The language of the order of October 12, 1871, could not refer to the exoneration from the previous subscription to the old railroad company, because the very issuance of the bonds presupposed the existence of such exoneration, the order of June 17, 1869 having provided "said bonds shall not be issued or said county pay any part of the principal or interest" "until said county of Green is fully and completely exonerated," *etc.*, from the previous subscription.

The bonds were issued in payment for stock obtained, voted on, and retained by the county. They were issued to raise money to build a road in the county, and the proceeds of $150,000 of the bonds were so used. The railroad company was the county's instrument to purchase the road for the bonds, and it would be iniquitous to hold the bondholder sponsor for the acts of the county's chosen representative, the railroad company. A person issuing notes to another whereon to raise money to be invested in property for the maker will not be heard to repudiate obligation upon the notes upon the ground that the agent entrusted to raise and expend the money had failed to expend all the money as required, and had failed to purchase with the money as much property as he had agreed to purchase. Cases involving the principle in point are, *Waggoner vs. German-American Title Co. 22 K. L. R. 215, 56 S. W. 961, and Cunningham vs. Potter, 23 K. L. R. 847, 64 S. W. 493*, where the makers of non-negotiable notes issued with the intention that the payees should raise money thereon, were held liable.

The enunciations of this court in *Coloma vs. Eaves, 92 U. S. 484, 486*, are very instructive in this connection, viz.: "At the outset, it is to be observed that the question is not between the town and its own agents; it is rather between the town and a person claiming through the action of its agents. The rights of the town as against its agents may be very different from its rights as against parties who have honestly dealt with its agents as such, on the faith of their apparent authority."

Again, *p. 487*,

"Is the ascertainment of these things (preliminary conditions) to be before the subscription is made, and

before the bonds are issued? Or must it be after the bonds have been sold, and be renewed every time a claim is made for the payment of a bond or a coupon? The latter appears to us inconsistent with any reasonable construction of the statute. Its avowed purpose was to aid the building of the railroad by placing in the hands of the railroad company the bonds of assenting municipalities. These bonds were intended for sale; and it was rationally to be expected that they would be put upon distant markets. It must have been considered that, the higher the price obtained for them, the more advantageous would it be for the company, and for the cities and towns which gave the bonds in exchange for capital stock. Everything that tended to depress the market value was adverse to the object the legislature had in view." * * * "Imposing such an obligation upon the purchasers would tend to defeat the primary purpose the legislature had in view; namely, aid in the construction of the road," etc.

Likewise, the situation which this court in *Graves vs. Saline County, 161 U. S. 360, 370*, quoted from the opinion in *Insurance Company vs. Bruce, 105 U. S. 328*, is suggestive in the instant case, viz.:

"The officers, both of the town and of the railroad company, knew, however, that bonds could not be negotiated in the market had their recitals disclosed the fact that payment depended upon conditions thereafter to be fulfilled by the railroad company. To the end, therefore, that money might be raised for the construction of the proposed road, or in reliance upon the performance by the railroad company of the conditions imposed, the con-

stituted authorities of the town, and the officers or agents of the company, co-operated in putting out bonds negotiable in form, and with recitals that gave no intimation even that the subscription was conditional."

In the case last quoted the court considered such stock subscriptions made in the case where there was a total want of power in the municipality, in the case where the power existed but subject to conditions prescribed by the Legislature, and in the case where the municipality was empowered to subscribe with or without conditions, as it might think proper, which is the instant case. In such a case, said the court, the municipal principal may waive its self-imposed conditions.

In the case at bar the municipality could subscribe with or without conditions as it thought fit. In fact, it imposed a condition precedent and required an agreement from the railroad company.

The condition precedent was the exoneration of the county, not from a subscription to the Elizabethtown & Tennessee Railroad—no such subscription had been made—but from "the payment of the capital stock voted by said county and *authorized to be subscribed*," etc. As has been seen, Green County was exonerated from the payment of the Elizabethtown & Tennessee stock, if it had ever been liable therefor, by the judgment of the Kentucky Court of Appeals in the Mercer County case. This took place after the order was made, but, in strict accordance with its terms, before the bonds were issued.

The other provision of the order, submitting the question of subscription to the vote of the people, was not a condition precedent, as the difference in its form clearly shows. It was

not a condition at all in the technical meaning of that word. It was the requirement of an agreement by the railroad Company with regard to the location of its road and the expenditure of the proceeds of the bonds subscribed.

The condition precedent having been performed, the officers of the municipality so determined, issued the bonds in payment of the county's subscription, and the company accepted the contract by accepting the bonds.

As to bonds issued under these circumstances Green County has no right to object either that there was no formal exoneration executed by deed, or that the railroad company has failed to carry out its agreement entirely.

It follows that both of the questions certified should be answered in the affirmative.

Respectfully,

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